Supreme Court, U.S.
FILED
SEP 11 2015
OFFICE OF THE CLERK

No. 14-915

In The Supreme Court of the United States

REBECCA FRIEDRICHS; SCOTT WILFORD; JELENA FIGUEROA; GEORGE W. WHITE, JR.; KEVIN ROUGHTON; PEGGY SEARCY; JOSE MANSO; HARLAN ELRICH; KAREN CUEN; IRENE ZAVALA; and CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

STEVEN J. LECHNER
Counsel of Record
GINA M. CANNAN
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
gina@mountainstateslegal.com

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

2. Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
IDENTITY AND INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. *ABOOD* IS AN OUTLIER IN THIS COURT'S FIRST AMENDMENT JURISPRUDENCE	5
II. THIS COURT SHOULD OVERRULE *ABOOD* BECAUSE IT FAILED TO APPLY STRICT SCRUTINY AND IS UNWORKABLE IN PRACTICE	19
A. The Agency Shop Arrangement Eviscerates Petitioners' Right To Freedom From Compelled Speech	20
B. The Agency Shop Arrangement Eviscerates Petitioners' Right To Freedom From Compelled Association	25
C. The Germaneness Standard Announced By *Abood* Is Unworkable	29

TABLE OF CONTENTS – Continued

Page

III. REQUIRING NONMEMBER EMPLOYEES TO OPT OUT OF FUNDING THE UNION'S POLITICAL SPEECH IMPERMISSIBLY BURDENS THEIR FREE SPEECH RIGHTS 33

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977) ..... *passim*

Aetna Insurance Co. v. Kennedy to Use of Bogash, 301 U.S. 389 (1937) 35

Agostini v. Felton, 521 U.S. 203 (1997) 19

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986) ..... *passim*

College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999) 34

Dashiell v. Montgomery County, Md., 925 F.2d 750 (4th Cir. 1991) 30

Davenport v. Washington Educ. Ass'n, 551 U.S. 177 (2007) 2, 16, 34

Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Esp. and Station Employees, 466 U.S. 435 (1984) 12, 26

Elrod v. Burns, 427 U.S. 347 (1976) 10, 33

Foster v. Mahdesian, 268 F.3d 689 (9th Cir. 2001) 31

Friedrichs v. Cal. Teachers Ass'n, No. SACV 13-676-JLS, 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013) 3

Friedrichs v. Cal. Teachers Ass'n, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014) 3

Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985) 29

TABLE OF AUTHORITIES – Continued

Page

Gardner v. State Bar of Nevada, 284 F.3d 1040 (9th Cir. 2002) 31

Harris v. Quinn, ___ U.S. ___, 134 S. Ct. 2618 (2014) ..... *passim*

Helvering v. Hallock, 309 U.S. 106 (1940) 19

Hudson v. Chicago Teachers Union, Local No. 1, 922 F.2d 1306 (7th Cir. 1991) 17

Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961) ..... *passim*

Johnson v. Zerbst, 304 U.S. 458 (1938) 35

Keller v. State Bar of California, 496 U.S. 1 (1990) 6, 30

Kingstad v. State Bar of Wis., 622 F.3d 708 (7th Cir. 2010) 31, 32

Knight v. Kenai Peninsula Borough School Dist., 131 F.3d 807 (9th Cir. 1997) 17

Knox v. Serv. Emps. Int'l Union, __ U.S. __, 132 S. Ct. 2277 (2012) ..... *passim*

Lancaster v. Air Line Pilots Association Int'l, 76 F.3d 1509 (10th Cir. 1996) 17

Lautenbaugh v. Nebraska State Bar Ass'n, No. 4:12CV3214, 2012 WL 6086913 (D. Neb. Dec. 6, 2012) 1

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 14, 15, 24, 31

Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422 (6th Cir. 1990) 13

TABLE OF AUTHORITIES – Continued

Page

Mountain States Legal Foundation v. City and County of Denver, 567 F. Supp. 476 (D. Colo. 1983) 2

Mountain States Legal Foundation v. Costle, 630 F.2d 754 (10th Cir. 1980) 2

Payne v. Tennessee, 501 U.S. 808 (1991) 20

Prescott v. County of El Dorado, 177 F.3d 1102 (9th Cir. 1999) 31

Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781 (1988) 20

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 25, 33

Romero v. Colegio de Abogados de Puerto Rico, 204 F.3d 291 (1st Cir. 2000) 26, 31

Ry. Employees' Dep't v. Hanson, 351 U.S. 225 (1956) ..... *passim*

Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620 (1st Cir. 1990) 30, 31

Shelton v. Tucker, 364 U.S. 479 (1960) 37

Smith v. Allwright, 321 U.S. 649 (1944) 20

State Emp. Bargaining Agent Coalition v. Rowland, 718 F.3d 126 (2d Cir. 2013) 32

United States v. United Foods, Inc., 533 U.S. 405 (2001) 23, 27

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 6, 7, 11

TABLE OF AUTHORITIES – Continued

Page

Wooley v. Maynard, 430 U.S. 705 (1977) .....*passim*

Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009).....2, 21

STATUTES

Railway Labor Act (45 U.S.C. § 152 *et seq.*) 9

CAL. GOV'T CODE § 3544(a) 22, 24

CAL. GOV'T CODE § 3544.9.....22, 28

RULES

Supreme Court Rule 37.3.....1

Supreme Court Rule 37.3(a).....1

Supreme Court Rule 37.6.....1

OTHER AUTHORITIES

Big Money Talks, California Fair Political Practices Commission (2010).....18

Bureau of Labor Statistics, News Release (Jan. 23, 2015).....17

CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT: ORIGINS THROUGH THE CIVIL WAR (Scott J. Hammond et al. eds., 2007).....5

Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087 (2005).....29

TABLE OF AUTHORITIES – Continued

Page

Marc Lifsher, *California Pension Funds Are Running Dry*, L.A. TIMES (Nov. 13, 2014).....27

Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 TEX. TECH. J. TEX. ADMIN. L. 23 (2000).....13

Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Speech*, 40 VAL. U. L. REV. 555 (2006).....26

Tom McGinty, *Political Spending by Unions Far Exceeds Direct Donations*, WALL STREET JOURNAL (July 10, 2012).....17

What California Workers Pay in Union Dues and Fees, THE SACRAMENTO BEE (Sep. 17, 2012).....18

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside, own property, and work in all 50 states. Since its creation in 1977, MSLF attorneys have defended individual liberties and been active in litigation seeking to vindicate First Amendment rights. *See, e.g.*, *Lautenbaugh v. Nebraska State Bar Ass'n*, No.

[1] Pursuant to Supreme Court Rule 37.3(a), all parties consent to the filing of this amicus curiae brief. Pursuant to Supreme Court Rule 37.6, the undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

4:12CV3214, 2012 WL 6086913 (D. Neb. Dec. 6, 2012) (represented Plaintiff); *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009) (Amicus Curiae); *Davenport v. Washington Eauc. Ass'n*, 551 U.S. 177 (2007) (Amicus Curiae); *Mountain States Legal Foundation v. City and County of Denver*, 567 F. Supp. 476 (D. Colo. 1983) (Plaintiff); *Mountain States Legal Foundation v. Costle*, 630 F.2d 754 (10th Cir. 1980) (Plaintiff). MSLF respectfully submits this amicus curiae brief, urging that this Court reverse the decision below.

STATEMENT OF THE CASE

This case involves a challenge to the most politically powerful union in California, the California Teachers Association ("CTA") and its national and local affiliates and representatives (collectively, "Respondents").[2] Petitioners are a group of public school teachers and the Christian Educators Association International (collectively, "Petitioners"). Petitioners are currently required to subsidize Respondents' collective-bargaining activities as a condition of their employment. The compelled speech and association caused by this "agency shop" arrangement significantly impinges on Petitioners'

[2] California Attorney General Kamala D. Harris intervened at the district court, was a Defendant-Intervenor in the court of appeals, and is also a Respondent in this proceeding.

First Amendment rights against compelled speech and compelled association by requiring them to support, with their mandatory dues, public policy goals with which they fundamentally disagree. Such impingement was sanctioned by *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), which held that nonmember employees may be compelled to pay mandatory dues to unions to support unions' collective bargaining activities but not ideological speech unrelated to collective bargaining. However, *Abood* has been called into question by this Court's recent decisions in *Knox v. Serv. Emps. Int'l Union*, ___ U.S. ___, 132 S. Ct. 2277 (2012) and *Harris v. Quinn*, ___ U.S. ___, 134 S. Ct. 2618 (2014), both of which indicate that *Abood* cannot be squared with this Court's First Amendment jurisprudence.

Petitioners filed suit against Respondents, alleging that the very existence of the agency shop impermissibly infringes on their First Amendment rights against compelled speech and compelled association. Petitioners also alleged that Respondents' opt-out requirements were inconsistent with the narrow tailoring required by *Knox*, 132 S. Ct. at 2277. At both the district court and the Ninth Circuit Court of Appeals, Petitioners conceded that this Court's decision in *Abood* precluded their claims regarding the agency shop arrangement and thus sought a quick ruling in order to vindicate their First Amendment rights before this Court. *Friedrichs v. Cal. Teachers Ass'n*, No. SACV 13-676-JLS, 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013), *aff'd, Friedrichs v. Cal. Teachers*

Ass'n, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014). Petitioners ask this Court to overrule *Abood* and reverse the decision below.

SUMMARY OF ARGUMENT

This Court has recognized that *Abood* is "something of an anomaly." *Knox*, 132 S. Ct. at 2290. That characterization puts it kindly. Since *Abood* was decided, courts have struggled to make sense of its novel approach to First Amendment rights. *Abood* held that the First Amendment permits compelled contributions to unions to further the government's interests in labor peace and avoiding free-riders, without carefully considering either the First Amendment rights at stake or the validity of the government's proffered interests. As a result, the "germaneness" test created by *Abood* to distinguish between "chargeable" union activities that may permissibly be funded by mandatory dues, and "nonchargeable" union activities that may not, have been the source of significant confusion. The test has been applied inconsistently, and has proved unworkable when it is applied. In the process, nonmember employees' First Amendment rights have been trampled. This Court's recent decision in *Harris*, 134 S. Ct. at 2618, highlights just how untenable *Abood*'s central holding is today.

Furthermore, by "historical accident[,]" previous compelled speech cases have provided a "remarkable

boon" to unions by allowing them to collect mandatory dues for even ideological speech unrelated to their collective-bargaining activities unless dues-payers opt out of paying such dues. *Knox*, 132 S. Ct. at 2283, 2290. Allowing unions to collect mandatory dues only when dues-payers opt *in* to paying such fees is more consistent with the narrow tailoring required by this Court's First Amendment cases. Thus, this Court should hold the agency shop arrangement inconsistent with the First Amendment. At the very least, this Court should not presume acquiescence in the loss of fundamental rights, and should require unions to provide nonmember employees the opportunity to opt in to supporting nonchargeable activities, rather than allowing them merely to provide an opt-out procedure. *See id.*

ARGUMENT

I. *ABOOD* IS AN OUTLIER IN THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

The compelled speech doctrine has developed as an essential component of the First Amendment right to free speech. James Madison observed that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT: ORIGINS THROUGH THE CIVIL WAR 360 (Scott

J. Hammond et al. eds., 2007). While Madison was concerned with state-sponsored (and thus taxpayer-funded) establishment of religion, his rationale has been echoed by this Court's compelled speech cases. *See, e.g.*, *Keller v. State Bar of California*, 496 U.S. 1, 10 (1990); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305 (1986). Indeed, compelled speech in the union context presents an impingement on First Amendment rights even greater than that contemplated by Madison. *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment) ("[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is *fully protected* as speech in this context." (emphasis added)).

This Court's line of compelled speech cases dates back to 1943, when a plurality held that the government could not constitutionally force a student to salute the flag or recite the pledge of allegiance. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) ("*Barnette*"). Justice Jackson eloquently explained the Court's rationale:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by

> word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642.

Then, in *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court held that the state of New Hampshire could not compel citizens to display license plates with the state's "Live Free or Die" motto when those citizens disagreed with the state motto. *Wooley* determined that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id.* at 714 (quoting *Barnette*, 319 U.S. at 637). Because freedom of speech and freedom *from* compelled speech are two sides of the same coin, *Wooley* reasoned that the state's interest in "disseminat[ing] an ideology" did not outweigh the individual's "First Amendment right to avoid becoming the courier for such message." *Id.* at 717.

One month after *Wooley* was handed down, the Court decided *Abood*, 431 U.S. at 209. Oddly, *Abood* did not mention *Wooley*, but conceded that the compelled speech cases were "applicable to the case at bar." *Id.* at 235. *Abood* started with the unremarkable proposition that the plaintiffs in the case, a group of public school teachers, could not be compelled "to contribute to the support of an ideological cause [they] may oppose as a condition of holding a job as a public school teacher." *Id.* Forcing them to do so

would infringe on First Amendment rights to freedom of speech and freedom of association.[3] *Id.*

However, this Court went on to hold that contributions may be compelled for collective-bargaining activities, despite the "difficult problems in drawing lines between collective-bargaining activities . . . and ideological activities unrelated to collective bargaining. . . ." *Id.* at 236. In reaching this conclusion, this Court relied almost exclusively on *Ry. Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) and *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), both of which dealt with private unions, to determine that the "important government interests" of "collective bargaining, contract administration, and grievance adjustment" justified the impingement upon freedom of speech and association caused by the agency shop arrangement. *Abood*, 431 U.S. at 223-32. *Hanson* upheld the constitutionality of compelling dues for collective bargaining in the private union context, but this Court noted that the problem of compulsory membership being used "to impair freedom of expression" was

---

[3] *Abood*'s central ruling that nonmember employees could not be compelled to subsidize the union's political and ideological union activities apparently prevented the concurring justices from dissenting. *See id.* at 255 (Powell, J., concurring in the judgment) ("I agree with the Court as far as it goes, but I would make it more explicit that compelling a government employee to give financial support to a union in the public sector *regardless of the uses to which the union puts the contribution* impinges seriously upon interests in free speech and association protected by the First Amendment." (emphasis added)).

"not presented by this record." 351 U.S. at 237-38. In his concurrence, Justice Frankfurter emphasized that the case:

> [R]aises questions not of constitutional validity but of policy in a domain of legislation peculiarly open to conflicting views of policy. . . . The Court has put to one side situations not now before us for which the protection of the First Amendment was earnestly urged at the bar. I, too, leave them to one side.

Id. at 239, 242 (Frankfurter, J., concurring).

Street held the use of dues for political purposes was not authorized by the Railway Labor Act (45 U.S.C. § 152 *et seq.*), and similarly side-stepped the First Amendment issues presented by *Abood* and the case at bar.[4] *Street*, 367 U.S. at 769-70; *see Harris*, 134 S. Ct. at 2632 ("*Street* was not a constitutional decision at all. . . ."). In relying on *Hanson* and *Street*, *Abood* treated the constitutionality of the agency shop arrangement as a foregone conclusion. 431 U.S. at 231. *Abood* then determined that the only difference between private and public unions is that public unions "attempt to influence governmental policy-making" and thus "their activities and the views of

---

[4] Justice Douglas wrote separately to emphasize his view that "even a selective use of union funds for political purpose subordinates the individual's First Amendment rights to the views of the majority." *Street*, 367 U.S. at 778 (Douglas, J., concurring) ("As I read the First Amendment, it forbids any abridgement by government whether directly or indirectly.").

members who disagree with them may be properly termed political." *Id.* *Abood* went on to state that "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry." *Id.* at 232.

Because of its mistaken reliance on *Hanson* and *Street*, *Abood* held that the First Amendment barred only compelled contributions to ideological speech unrelated to collective bargaining, without any real consideration of the infringement on First Amendment rights caused by allowing other forms of compelled subsidization. *Abood*, 431 U.S. at 234-36; *see id.* at 243 (Rehnquist, J., concurring) ("I do not read the Court's opinion as leaving intact the 'unfettered judgment of each citizen on matters of public concern' when it holds that Michigan may . . . require an objecting member of a public employees' union to contribute to the funds necessary for the union to carry out its bargaining activities. Nor does the Court's opinion leave such a member free 'to believe as he will and to act and associate according to his beliefs.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 372 (1976) (plurality))).

Contrary to *Abood*'s truncated reasoning, the difference between compelled contributions to public and private unions is not merely that public union activities can be termed "political." *Id.* at 231. In relying on *Hanson* and *Street*, *Abood* improperly ignored the significant First Amendment implications

of allowing the government itself, rather than a private entity, to compel speech under the guise of labor peace.[5] Indeed, the government is beholden to the First Amendment in a way that private entities are not: "The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Knox*, 132 S. Ct. at 2288; *Wooley*, 430 U.S. at 715 (When the government forces an individual to "foster[ ] public adherence to an ideological point of view he finds unacceptable," the government "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" (quoting *Barnette*, 319 U.S. at 642)). Furthermore, *Abood* drew a line that is hard to see: "In the public sector, core issues such as wages,

---

[5] While concurring in the judgment, three justices wrote separately to emphasize their disagreement with the majority's "novel premise that public employers are under no greater constitutional constraints than their counterparts in the private sector. . ." *Id.* at 245 (Powell, J., concurring in the judgment). Indeed, Justice Powell was unflinching in his view that the majority failed to apply established First Amendment principles:

> I would adhere to established First Amendment principles and require the State to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled contribution is necessary to serve overriding governmental objectives. This placement of the burden gives appropriate protection to First Amendment rights without sacrificing ends of government that may be deemed important.

Id. at 264 (Powell, J., concurring in the judgment).

pensions, and benefits are important political issues, but that is generally not so in the private sector. . . . *Abood* failed to appreciate the conceptual difficulty of distinguishing between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Harris*, 134 S. Ct. at 2632.

The cases that followed *Abood* attempted to remedy its shortcomings without outright overruling its central holding. In *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Esp. and Station Employees*, 466 U.S. 435 (1984), the Court realized that *Abood* was too narrow and held that the First Amendment prohibits not only compelled ideological speech, but also prohibits compelled funding of all activities "not germane to its duties as collective-bargaining agent." *Id.* at 447-48. *Ellis* recognized that, "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree."[6] *Id.* at 455. Two years later, in *Hudson*, 475 U.S. at 305-08, the Court attempted to set forth criteria for union procedures that would protect nonmember employees'

---

[6] The constitutionality of the union shop was not at issue in *Ellis*, and thus the Court did not revisit *Abood*'s holding that compelled membership in a union was constitutionally permissible. *Id.* at 439 ("[The employees] do not contest the legality of the union shop. ").

First Amendment rights. *See Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 428 (6th Cir. 1990) ("[A] large number of lower court decisions suggested the inadequacy of various intra-union procedures. . . . Confusion in the lower courts, and the divergent approaches of those courts to the issue is what led the Supreme Court in *Hudson* to grant certiorari."). *Hudson*'s required procedures include: (1) an adequate explanation of non-chargeable activities funded by mandatory dues, including the major categories of expenses and verification by an independent auditor; (2) a grievance procedure that will provide a reasonably prompt decision by an impartial decision-maker; and (3) a rebate or refund of that portion of mandatory dues which is non-chargeable.[7] 475 U.S. at 306-08, 310.

Unfortunately, as this Court recently recognized, *Hudson*'s attempts to limit unions' infringement on nonmember employees' First Amendment rights have been insufficient, based in part on the fact that "'each one of the three "prongs" of the [*Hudson*] test involves

---

[7] Mandatory associations have consistently failed to adopt *Hudson* procedures, much less adhere to them. For example, in a survey of mandatory bar associations' varying degrees of compliance with *Hudson*, "[m]any of the unified bars that acknowledge a duty to avoid political or ideological activities ignore their concomitant obligation under *Hudson* to implement adequate disclosure and adopt a mechanism for members to object to improper expenditures." Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 TEX. TECH. J. TEX. ADMIN. L. 23, 25-26 (2000).

a substantial judgment call. . . .'" *Harris*, 134 S. Ct. at 2633 (quoting *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 551 (1991) (Scalia, J., dissenting)). It is now apparent that unions cannot be trusted to make that "judgment call" when choosing between the First Amendment rights of nonmember employees and greater funds to support their activities. *Id.* (explaining that employees face a "heavy burden" if they wish to challenge a union expenditure, and there is no audit required of the correctness of a union's categorization of expenses).

In *Lehnert*, this Court pushed back against *Abood*'s central holding in deciding an as-applied First Amendment challenge to the same statute at issue in *Abood*:

> The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.' The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. *When the subject of compelled speech is the discussion of governmental affairs, which is at the core of First Amendment freedoms, the burden upon dissenters' rights extends far beyond the acceptance of the*

> *agency shop and is constitutionally impermissible.*

Id. at 522 (quoting *Wooley*, 430 U.S. at 715) (emphasis added) (internal citations omitted). In the context of public unions, *Lehnert* recognized – as *Abood* did not – that most union activities can be classified as "governmental affairs." *Id. Lehnert* held that a state could not compel public employees to subsidize union activities "outside the limited context of contract ratification or implementation." *Id.* The Court again recognized the practical difficulties of compelling public employees to support some union activities but not others: "The dual roles of government as employer and policymaker in such cases make the analogy between lobbying and collective bargaining in the public sector a close one." *Id.* at 520. However, the union activities at issue were not a "close" case, and *Lehnert* found the activities far too attenuated from the union's collective-bargaining role to even approach the "'haz[y]' line" set by *Abood*. *Id.* (quoting *Abood*, 431 U.S. at 236).

More recent compelled speech cases have demonstrated the extent to which unions have failed entirely to implement, in any meaningful way, the "germaneness" standard set by *Abood*. *See, e.g.*, *Knox*, 132 S. Ct. at 2294-95 ("[The union's] understanding of the breadth of chargeable expenses is so expansive that it is hard to place much reliance on its statistics. . . . If we were to accept this broad definition of germaneness, it would effectively eviscerate the limitation on the use of compulsory fees to support

unions' controversial political activities."). In order to vindicate their First Amendment rights, nonmember employees have borne the burden of mounting a legal challenge to the union's categorization of expenditures, which is antithetical to the notion of the burden being borne by "the side whose constitutional rights are not at stake."[8] *Knox*, 132 S. Ct. at 2295. This burden is significant:

> [T]he Court apparently rules that public employees can be compelled by the State to pay full union dues to a union with which they disagree, subject only to a possible rebate or deduction if they are willing to step forward, declare their opposition to the union, and initiate a proceeding to establish that some portion of their dues has been spent on "ideological activities unrelated to collective bargaining."

---

[8] This Court has made clear that, while unions may have a First Amendment right to free speech, that right does not include a "constitutional entitlement to the fees of nonmember-employees." *Davenport*, 551 U.S. at 185 (Upholding state statute restricting union's use of mandatory dues because "[the statute] is not fairly described as a restriction on how the union can spend 'its' money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money.") (emphasis in original); *Knox*, 132 S. Ct. at 2291 ("Far from calling for a balancing of rights or interests, *Hudson* made it clear that any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights." (quoting *Hudson*, 475 U.S. at 303)).

Abood, 431 U.S. at 245 (Powell, J., concurring in the judgment). Nonmember employees have even been threatened with discharge for failing to pay union dues while a legal challenge to the constitutionality of compelled dues was pending. *See Knight v. Kenai Peninsula Borough School Dist.*, 131 F.3d 807, 811 (9th Cir. 1997). And some lower courts have required "exhaustion," forcing nonmembers to arbitrate a union's chargeability determinations before seeking relief in federal court. *See Lancaster v. Air Line Pilots Association Int'l*, 76 F.3d 1509, 1521-23 (10th Cir. 1996); *Hudson v. Chicago Teachers Union, Local No. 1*, 922 F.2d 1306, 1314 (7th Cir. 1991). Such burdens on the First Amendment rights of nonmember employees cannot be squared with a Constitution that "protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley*, 430 U.S. at 715.

In *Harris*, this Court stated that, considering that public employee unions are political powerhouses, "[a]gency fee provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees."[9] 134 S. Ct. at 2643. Instead,

---

[9] Nationally, unions have increased their spending on politics and elections in recent years. Tom McGinty, *Political Spending by Unions Far Exceeds Direct Donations*, WALL STREET JOURNAL (July 10, 2012), *available at* http://www.wsj.com/articles/SB10001424052702304782404577488584031850026 (last viewed Sep. 7, 2015). In California, 17.4 percent of workers are unionized for a total of 2.5 million union employees. Bureau of

(Continued on following page)

with the benefit of hindsight and the lower courts' grappling with *Abood*, this Court recognized the "magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either chargeable . . . or nonchargeable[,]" as well as the "practical problems" that objecting employees face in mounting legal challenges to a union's categorization of expenses as germane and chargeable. *Id.* at 2633 (internal quotations omitted). Because the union had failed to demonstrate that compelled contributions from personal healthcare assistants were necessary to serve a compelling governmental interest, this Court held that the First Amendment prohibited collection of *any* mandatory dues from those assistants. *Id.* at 2644. Rather than attempt to fix *Abood*'s deficiencies with a Band-Aid, as had previous decisions, *Harris* admitted that "[t]he *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided

---

Labor Statistics, News Release (Jan. 23, 2015), *available at* www.bls.gov/news.release/pdf/union2.pdf (last viewed Sep. 7, 2015). In 2012, the Sacramento Bee estimated that California workers paid roughly $1.2 *billion* in union dues and fair share fees. *What California Workers Pay in Union Dues and Fees*, THE SACRAMENTO BEE (Sep. 17, 2012), *available at* http://blogs.sacbee.com/the_state_worker/2012/09/from-the-notebook-what-california-state-workers-pay-in-union-dues-and-fees.html (last viewed Sep. 7, 2015). The CTA is the biggest political spender, by far, in California politics, spending twice as much as the next biggest political contributor (also a union). *Big Money Talks*, California Fair Political Practices Commission 10-11 (2010), *available at* http://www.fppc.ca.gov/reports/Report31110.pdf (last viewed Sep. 7, 2015).

the constitutionality of compulsory payments to a public-sector union." *Id.* at 2632. This case presents the Court with the opportunity that *Harris* did not – the opportunity to overrule *Abood* and afford *all* nonmember employees of unions the First Amendment protections against compelled speech and association espoused in both this Court's earlier decisions and its more recent decisions.[10]

II. THIS COURT SHOULD OVERRULE *ABOOD* BECAUSE IT FAILED TO APPLY STRICT SCRUTINY AND IS UNWORKABLE IN PRACTICE.

Abood was cursory in both its analysis of the asserted governmental interests and the First Amendment rights at stake. Rather than applying the strict scrutiny required by this Court's First Amendment cases, *Abood* relied on *Hanson* and *Street* to determine that the state's interest in preventing free-riders and preserving labor peace were sufficient

---

[10] The doctrine of *stare decisis* is particularly weak where a decision conflicts with both earlier and later case law. *See Agostini v. Felton*, 521 U.S. 203, 235 (1997) ("The doctrine of *stare decisis* does not preclude us from recognizing the change in our law and overruling [prior law] inconsistent with our more recent decisions."); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) ("*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.").

to justify the impingement on nonmember employees' rights against compelled speech and compelled association. *Abood*, 431 U.S. at 224-30. *Abood* also failed to carefully consider the impingement of the agency shop arrangement on nonmember employees' First Amendment rights against compelled speech and compelled association, and did not analyze whether the agency shop arrangement was the least restrictive means of achieving the alleged state interests. *Id.* at 234-35. Finally, *Abood*'s "germaneness" test has proven to be unworkable in practice and inconsistently applied by the lower courts. Each of these shortcomings, standing alone, is sufficient reason to overrule *Abood*. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

A. The Agency Shop Arrangement Eviscerates Petitioners' Right To Freedom From Compelled Speech.

It is axiomatic that compelled speech triggers strict scrutiny. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 782, 795 (1988); *Knox*, 132 S. Ct. at 2291 (Collection of mandatory dues must serve a "compelling interest" and be "'carefully tailored to minimize the infringement' of free speech rights." (quoting *Hudson*, 475 U.S. at 303)). *Abood* "reverse[d] th[e] principle" that "when state law intrudes upon protected speech, the State itself must

shoulder the burden of proving that its action is justified by overriding state interests." *Abood*, 431 U.S. at 263 (Powell, J., concurring in the judgment). Rather than hold the state to its burden, *Abood* determined that the state's interests in preventing free-riders and preserving labor peace justified the agency shop arrangement. *Abood*, 431 U.S. at 224-30. Relying on *Abood*, Respondents assert that, because CTA has been designated the exclusive bargaining representative by the state in order to preserve labor peace, the compelling interest arises from the state's "concomitant interest in ensuring that bargaining representatives have the resources to perform their statutory duties." Br. for the Attorney General of Cal. in Opposition at 8-9 ("AG Opp. Br."); *see also* Br. of Respondents Cal. Teachers' Ass'n, *et al.*, in Opposition at 2-3, 17-18 ("CTA Opp. Br."). However, this Court has looked critically on *Abood*'s assumption that "[a] union's status as exclusive bargaining agent and the right to collect an agency fee" are "inextricably linked." *Harris*, 134 S. Ct. at 2640 ("A host of organizations advocate on behalf of the interests of persons falling within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions."); *see also Ysursa*, 555 U.S. at 355 ("The First Amendment prohibits government from 'abridging the freedom of speech'; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression.").

Similarly, the "free rider" justification cited by *Abood*, 431 U.S. at 221-23, simply does not justify the infringement on nonmember employees' First Amendment rights. Respondents' rationale for compelled contributions to avoid free-riders is as follows: California law grants the CTA the power of exclusive bargaining representation for public school teachers. CAL. GOV'T CODE § 3544(a). California law also prevents the exclusive bargaining representative from engaging in collective bargaining to the detriment of nonmember employees. *Id.* § 3544.9. Thus, nonmember employees should be compelled to subsidize the CTA's collective bargaining activities to pay for the collective-bargaining outcomes obtained by the CTA. CTA Opp. Br. at 17-20; AG Opp. Br. at 8-9.

However, the "free rider" argument assumes that nonmember employees agree with – or at the very least, benefit from[11] – the outcomes of the union's collective bargaining efforts. *See* CTA Opp. Br. at 26 ("nonmember teacher[s] . . . receive[] the benefit of additional compensation as a result of the Unions' efforts in collective bargaining. . . ."). The CTA was

---

[11] This Court has held that mandatory dues cannot be justified merely because nonmember employees benefit from the subsidized union's activities. *Harris*, 134 S. Ct. at 2636. If that were all that was required, a wide range of associations could compel contributions based on the paternalistic notion that it was in the dues-payer's best interest. Furthermore, Petitioners here contend that policies pursued by the CTA do not benefit above-average teachers, but instead protect bad teachers. Brief for the Petitioners at 35-36 ("Petitioners' Br.").

designated the exclusive bargaining representative by a majority of union members, but the First Amendment explicitly protects the First Amendment rights of the minority to dissent from the majority. *Wooley*, 430 U.S. at 715; *Harris*, 134 S. Ct. at 2629 (The First Amendment does not "give *carte blanche* to any legislature to put . . . professional people into goose-stepping brigades."); *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001) ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.").

The First Amendment also requires that "any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights." *Knox*, 132 S. Ct. at 2291 (quoting *Hudson*, 475 U.S. at 303). Requiring nonmember employees to subsidize the dissemination of public policy positions they oppose is not the least restrictive means of achieving state interests in preventing free-riders and preserving labor peace, even if those interests are assumed to be compelling. As demonstrated by Petitioners, there are numerous states where union dues are voluntary, and those unions are thriving. Petitioners' Br. at 31-33. If the union provides valuable services to dues-paying members, it can be assumed that a substantial portion of employees will voluntarily pay such dues. *Harris*, 134 S. Ct. at 2641. At the very least, the majority of employees who voted to unionize under

CAL. GOV'T CODE § 3544(a) could be counted on for support.

Put simply, there is no basis for *Abood*'s conclusion that nonmember employees' dues are necessary to further the state's interests in preventing free-riders and preserving labor peace, and this Court should hold Respondents to their burden to demonstrate otherwise. Respondents contend that "[P]etitioners have built no record to support [their] factual premise" regarding the effect of mandatory dues on collective bargaining. AG Opp. Br. at 10; *see also* CTA Opp. Br. at 22-27. However, Petitioners do not challenge the CTA's expenditures on a case-by-case basis. Instead, they argue that the very existence of the agency shop infringes on their First Amendment right against compelled speech and that *Abood* erred in holding that state interests in preventing free-riders or preserving labor peace can justify the infringement. Petitioners' Br. at 12-14. Further, nothing prevents Respondents from "com[ing] forward and demonstrat[ing] . . . that the compelled contribution is necessary to serve overriding governmental objectives." *Abood*, 431 U.S. at 264 (Powell, J., concurring in the judgment). The association collecting mandatory dues has always borne the burden of proving that its expenditures are constitutionally justified. *Lehnert*, 500 U.S. at 513; *Hudson*, 475 U.S. at 306. Therefore, this Court should overrule *Abood*'s cursory analysis of nonmember employees' right against freedom of compelled speech, and hold

Respondents' agency shop arrangement unconstitutional under the First Amendment.

B. The Agency Shop Arrangement Eviscerates Petitioners' Right To Freedom From Compelled Association.

The First Amendment protects a right to association, and a concomitant right to be free from compelled association. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("*Jaycees*") ("Freedom of association therefore plainly presupposes a freedom not to associate."); *Knox*, 132 S. Ct. at 2288 ("[T]he ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed."). Restrictions on the right not to associate are subject to strict scrutiny. *Jaycees*, 478 U.S. at 623. This right is distinct from the right to freedom from compelled speech. As one scholar explained:

> Although rights of speech and association are interdependent, they are also analytically distinct, as can be seen in *Abood* itself. Labor unions are organizations with ideological purposes and messages, so that First Amendment rights of association attach to their formation. First Amendment concerns are therefore triggered by requiring dissident employees to affiliate with labor unions, whether or not the dues of dissident employees are used to support the specifically ideological speech of unions. The right not to associate with a union, and the right not to

> support its ideological speech, are logically separate issues.

Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Speech*, 40 VAL. U. L. REV. 555, 567 (2006); *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 301 (1st Cir. 2000) ("The very act of the state compelling an employee or an attorney to belong to or pay fees to a union or bar association implicates that person's First Amendment right not to associate." (citing *Ellis*, 466 U.S. at 455)).

Abood skirted the fact that paying mandatory dues to the union, standing alone, implicates nonmember employees' First Amendment right against compelled association. Rather than giving the government's interest in compelling union association in the first place careful analysis, *Abood* merely looked to *Hanson* and *Street* as conclusive authority. *Abood*, 431 U.S. at 222 ("To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such an interference as exists is constitutionally justified. . . ." (footnote omitted)).

Petitioners disagree with Respondents' viewpoints on matters of education and fiscal policy, and Respondents do not contend that they represent the viewpoints of all public school teachers. Petitioners'

Br. at 22-24. Nevertheless, as a condition of employment, Petitioners are forced to associate with Respondents' particular political views and agenda – an agenda that has a tremendous impact on the state fisc and, consequently, impacts taxes, state programs, and the very solvency of state and local governments. *See* Marc Lifsher, *California Pension Funds Are Running Dry*, L.A. TIMES (Nov. 13, 2014), *available at* http://www.latimes.com/business/la-fi-controller-pension-website-20141114-story.html (last viewed Sep. 7, 2015) (estimating that the state teachers' pension fund has a shortfall of $70 billion). It is infringement enough on nonmember employees' First Amendment right to associate that California law prohibits them from organizing a competing union. *See Abood*, 431 U.S. at 224 (asserting that the government has a compelling interest in prohibiting rival unions in order to preserve "labor peace"). *Abood* did not offer any justification for the additional infringement of requiring nonmember employees to also contribute funds to an organization that directly pursues policy goals with which they disagree. Such infringement is more weight than the First Amendment can bear. *See United Foods*, 533 U.S. at 410-11 (Even where the speech at issue "does not compel expression of political or ideological views[,]" "First Amendment concerns apply . . . because of the requirement that producers subsidize speech with which they disagree.").

The only other government interest Respondents can assert is the interest in avoiding free-riders. CTA

Opp. Br. at 24-27. As demonstrated *supra*, Petitioners have no desire to free ride on Respondents' collective bargaining efforts. They would prefer not to ride the train at all. Furthermore, as Petitioners demonstrate, it is only because Respondents sought exclusive bargaining representative status that they are prevented from bargaining to the detriment of nonmember employees under state law in the first place. CAL. GOV'T CODE § 3544.9; Petitioners' Br. at 36-37.

Abood determined that "[t]he same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue." 431 U.S. at 225. However, this Court has since interpreted *Hanson* differently: "*Hanson* did not suggest that 'industrial peace' could justify a law that 'forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought,' or a law that forces a person to 'conform to [a union's] ideology.'" *Harris*, 134 S. Ct. at 2629 (quoting *Hanson*, 351 U.S. at 236-37) (alteration in original). This Court should hold that *Abood* erred in holding that governmental interests in labor peace and avoiding free-riders justified the substantial impingement on nonmember employees' right against freedom of association, and hold Respondents' agency shop arrangement unconstitutional under the First Amendment.

C. The Germaneness Standard Announced By *Abood* Is Unworkable.

Abood anticipated difficulties in line-drawing between activities germane to collective bargaining, which it asserted could be chargeable to nonmember employees, and activities unrelated to collective bargaining, which could not constitutionally be chargeable to nonmembers. 431 U.S. at 236. What the *Abood* court did not foresee was just how difficult it would be for the lower courts to apply a standard that relied on the unions themselves to make chargeability determinations.[12] *See* Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1097 (2005) (Discussing lower courts' "dissatisfaction with the germaneness standard[.]"). The circuit courts have found it "impossible" to, for example, "separate the educational component of lobbying, campaigning, or researching a paper that urges passage of certain legislation from the organization's ideological goal which is directly advanced by those activities." *Galda v. Rutgers*, 772 F.2d 1060, 1066 (3d Cir. 1985). Distinguishing between germane and non-germane activities

---

[12] Justice Black's dissent in *Street*, on the other hand, aptly foretold the shortcomings of an approach that required unions to refund only that portion of union dues used for non-germane activities: "[W]hile the Court's remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated." *Street*, 367 U.S. at 796 (Black, J., dissenting).

has become a subjective exercise in guessing where to draw *Abood*'s elusive line. *See, e.g.*, *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 634 (1st Cir. 1990) (reasoning that a publication devoted to educational articles may be funded by compulsory dues, but a publication containing "markedly political and ideological material" may not – "unless, perhaps, the magazine publishes a broad spectrum of counter-balancing views"). As this Court recognized in *Keller*, only "the extreme ends of the spectrum are clear." 496 U.S. at 15. Even unions acting in good faith cannot reasonably be expected to separate their expenditures into two neat categories. This Court recently quoted favorably the dissent in *Street*, where Justice Frankfurter wrote that, "[i]n light of the 'detailed list of national and international problems on which the [union] speaks . . . it seems rather naïve' to believe 'that economic and political concerns are separable.'" *Harris*, 134 S. Ct. at 2630 (quoting *Street*, 367 U.S. at 814 (Frankfurter, J., dissenting)) (explaining that *Street*'s dissenters "accurately predicted that the Court's approach would lead to serious practical problems"); *see also Dashiell v. Montgomery County, Md.*, 925 F.2d 750, 756 (4th Cir. 1991) ("[T]he practicalities of imposing a charge in advance of the actual expenditures lead inevitably to the observation that the computation cannot . . . be made with mathematical precision.").

Even worse, the germaneness standard has at times become a means to an end, whereby any expenditure – no matter how attenuated from the purposes of the mandatory organization – can be

rationalized. *See, e.g.*, *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 720-21 (7th Cir. 2010) (public advertising campaign for attorneys is germane because it fosters and earns the public trust, disseminating the "powerful" message that "'lawyers are not merely a necessity but a blessing.'" (quoting *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1043 (9th Cir. 2002))). The courts' willingness to accept any rationale for the unions' chargeability determinations is inconsistent with First Amendment principles that require the government to demonstrate that collection of mandatory dues is the least restrictive means of furthering a compelling state interest. *Lehnert*, 500 U.S. at 513; *Hudson*, 475 U.S. at 306.

In their attempts to make sense of *Abood*, circuit courts have inconsistently applied the "germaneness" standard. Rather than determining whether expenditures are germane to a mandatory association's purpose and may thus be subsidized by mandatory dues, courts have applied even more subjective standards. *See, e.g.*, *Schneider*, 917 F.2d at 633-34 (querying whether the issues lobbied on by a state bar association were "politically noncontroversial"); *Romero*, 204 F.3d at 300 (discussing "scattered language in the opinions dealing with ideological activities" that suggests germaneness is only a test in ideological expenditure cases); *Foster v. Mahdesian*, 268 F.3d 689 (9th Cir. 2001) ("Non-chargeable fees include those expenditures that 'support or advance the union's political or ideological causes.'" (quoting *Prescott v. County of El Dorado*, 177 F.3d 1102, 1106

(9th Cir. 1999)); *Kingstad*, 622 F.3d at 719 (determining that bar association's public image campaign was germane because it "benefit[ted]" the legal profession). If *Abood* is allowed to stand, its germaneness standard will continue to be inconsistently applied by the lower courts.

These formulations highlight *Abood*'s fatal flaw. It has become apparent that *Abood* conflicts with "the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S. Ct. at 2644. Applying a germaneness test to union activities is an exercise in futility that fails to protect nonmember employees' First Amendment rights because, "in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government." *Id.* at 2632-33. There is no substantive difference between compelled contributions for lobbying regarding collective bargaining and compelled contributions for lobbying on other politically-charged issues – a fact that even *Abood* acknowledged. 431 U.S. at 228 ("[D]ecisionmaking by a public employer is above all a political process" undertaken by people "ultimately responsible to the electorate."); *see also State Emp. Bargaining Agent Coalition v. Rowland*, 718 F.3d 126, 134 (2d Cir. 2013) ("[A] public employee union's positions on wages effectively *are* positions on public policy." (emphasis in original)). Petitioners in this case have as much of an objection to lobbying regarding Respondents' collective bargaining agreement

and "education policy" as they do to Respondents' lobbying for a particular political candidate. Petition for a Writ of Certiorari at 18-20 ("Petition"). *Abood* offered no rationale for allowing such an infringement on nonmember employees' First Amendment rights, 431 U.S. at 229-30, and Respondents have not formulated one here. Because *Abood*'s germaneness test cannot be squared with this Court's First Amendment jurisprudence and is unworkable in practice, this Court should overturn *Abood* and hold Respondents' agency shop arrangement unlawful under the First Amendment.

III. REQUIRING NONMEMBER EMPLOYEES TO OPT OUT OF FUNDING THE UNION'S POLITICAL SPEECH IMPERMISSIBLY BURDENS THEIR FREE SPEECH RIGHTS.

If this Court chooses not to overrule *Abood*, at the very least it should apply strict scrutiny to Respondents' collection of dues for non-chargeable activities, specifically, its political speech that is unrelated to collective bargaining. As demonstrated above, the First Amendment requires narrow tailoring. *Knox*, 132 S. Ct. at 2291; *see, e.g.*, *Jaycees*, 486 U.S. at 623 (procedures burdening First Amendment rights can only be justified where a compelling state interest "cannot be achieved through means significantly less restrictive of associational freedoms."); *Elrod*, 427 U.S. at 363 ("In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional

challenge, it must further some vital government end by means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."). When faced with the question of who should bear the risk that "unconsenting nonmembers will have paid too much or too little," this Court held that "[t]he answer is obvious: the side whose constitutional rights are *not* at stake." *Knox*, 132 S. Ct. at 2295 (emphasis added); *Davenport*, 551 U.S. at 185. Absent narrow tailoring, "[t]he general rule – individuals should not be compelled to subsidize private groups or private speech – should prevail." *Knox*, 132 S. Ct. at 2295.

Requiring nonmember employees to opt out of paying non-chargeable union dues is inconsistent with this Court's First Amendment jurisprudence. In *Knox*, this Court correctly recognized that an opt-*in* procedure is the only procedure consistent with the goal of minimizing the "substantial[ ]" infringement on free speech rights caused by the very existence of the agency shop. 132 S. Ct. at 2295, 2296 n.9; *see Hudson*, 475 U.S. at 303, 303 n.11 (stating that procedures must be "carefully tailored to minimize the infringement [on First Amendment rights]" and citing cases requiring the least restrictive means be used to achieve compelling state interests). *Knox* gave teeth to the oft-repeated axiom that acquiescence with the loss of fundamental rights should not be presumed. 132 S. Ct. at 2290 (citing *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense*

Bd., 527 U.S. 666, 682 (1999)); *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights." (quoting *Aetna Insurance Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937))). *Knox* recognized that previous cases' allowance of an opt-out system was inconsistent with narrow tailoring.[13] 132 S. Ct. at 2291 ("[O]ur prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.").

Knox also determined that requiring a nonmember employee to affirmatively make known his objection to being forced to subsidize the union's activities is to presume that the nonmember employee intends to waive his fundamental rights. 132 S. Ct. at 2290. Such a presumption is inconsistent with the strict scrutiny historically applied to actions that compel speech or subsidization of speech. *Id.* (Recognizing the inconsistency of "putting the burden on the nonmember to opt out" when "the probable preferences of most nonmembers . . . [is likely] not to pay the full amount of union dues[.]"). An opt-out system, rather than providing the careful tailoring mandated in *Hudson*, "creates a risk that the fees paid by nonmembers

---

[13] *Knox* understood previous cases' acceptance of an opt-out approach to be more of a "historical accident" than anything. 132 S. Ct. at 2290 ("our prior cases have given surprisingly little attention to the distinction[ ]" between opt-in and opt-out schemes).

will be used to further political and ideological ends with which they do not agree." *Id.* An opt-in system, on the other hand, is consistent with placing the burden on "the side whose constitutional rights are not at stake." *Id.* at 2283.

In the case at bar, Petitioners are required to renew their objection to the union's ideological expenditures on an annual basis. Petitioners' Br. at 6-7. Nonmember employees who wish to opt out of contributing to the CTA's political activities[14] thus bear the burden of sending an annual letter to the CTA noticing their objection by the union's deadline. *Id.* As the CTA does not educate teachers on their right to opt out of subsidizing the union's political activities, Petition at 7, dissenting employees also bear the burdens of knowing that such an option exists and then paying close enough attention to the union's mailings so as not to miss the check-off. Such burdens on nonmember employees' First Amendment rights simply are not the least restrictive means of collecting any portion of union dues, even if Respondents were able to demonstrate a compelling interest in collecting such dues. *Wooley*, 430 U.S. at 716-17 ("Even were we to credit the State's reasons and 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by

---

[14] As demonstrated above and in Petitioners' Brief, there are very few union activities that could not be termed "political." Petitioners' Br. at 22. Currently, the CTA allows nonmember employees to opt out of funding only a portion of union activities – those the union determines to be nonchargeable. *Id.* at 7.

means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.'" (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960))). Thus, this Court should hold Respondents' opt-out procedure unconstitutional under the First Amendment.

CONCLUSION

For the foregoing reasons, the Court should overturn *Abood*, reverse the judgment below, and hold that the agency shop arrangement is unconstitutional under this Court's First Amendment cases. In the alternative, the Court should hold that any procedure for collecting non-chargeable mandatory dues from nonmember employees must allow such employees to affirmatively opt in to paying such dues, rather than requiring them to opt out.

Respectfully submitted,

STEVEN J. LECHNER
Counsel of Record
GINA M. CANNAN
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
gina@mountainstateslegal.com

Attorneys for Amicus Curiae